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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-1118

FORD MOTOR COMPANY,
Petitioner,

vs.

W. F. HOLT & SONS, INC., and BRISTOL STEEL & IRON WORKS, INC.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION FOR W. F. HOLT & SONS, INC., RESPONDENT

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INDEX

Jurisdiction 1
Opinions Below 1
Questions Presented 2
Statement of the Case 2
Argument Against 5
Conclusion 8

Citations

CASES

Chicago, R. I. & Pacific R. R. Co. v. *Dobry Flour Mills*, 211 F. 2d 785 (10th Cir. 1954) 6, 7
Chicago, Rock Island & Pacific Railway Co. v. *United States*, 220 F. 2d 939 (7th Cir. 1955) 7
Erie Railroad Co. v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) 4, 6
Finley v. *U. S. Casualty Co.*, 113 Tenn. 592, 83 S.W. 2 (1904) 4, 6
Missouri Pacific Railroad Co. v. *Arkansas Oak Flooring Co.*, 434 F. 2d 575 (8th Cir. 1970) 7
Tankrederiet Gefion A/S v. *Hyman Michaels Company*, 406 F. 2d 1039 (6th Cir. 1969) 8

MISCELLANEOUS

U. S. Supreme Court Rule 19.1 (b), 28 U.S.C. 5, 6

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JURISDICTION

This respondent does not question the jurisdiction as set forth in the petition.

OPINIONS BELOW

The opinions of the district court and the U. S. Court of Appeals for the Sixth Circuit have now been published in 335 F. Supp. 775, and 453 F. 2d 116 (6th Cir. 1971).

QUESTIONS PRESENTED

This respondent believes the questions presented, as indicated by the statement of the case and petitioner's argument, are as follows:

I. WHERE, PURSUANT TO *ERIE* v. *TOMPKINS*, A COURT OF APPEALS CONSTRUES AND APPLIES THE LAW OF TENNESSEE TO AN INDEMNITY CLAUSE IN A CONTRACT, AND, AFTER DETERMINING THE LEGAL EFFECT THEREOF, APPLIES THE FACTS AS FOUND BY THE DISTRICT COURT, HAS THERE BEEN A DEPARTURE SO FAR FROM ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION? U. S. SUPREME COURT RULE 19.1 (b), 28 U.S.C.

I. IN A DIVERSITY CASE DECIDED AFTER *ERIE* v. *TOMPKINS*, SHOULD THE COURT ISSUE THE WRIT WHERE THE PETITIONER DOES NOT CITE CASES DEMONSTRATING A CONFLICT AMONG THE CIRCUITS?

STATEMENT OF THE CASE

The parties will be referred to as Ford, Holt, & Bristol, nd the injured employee (John W. Elizer) as Elizer.

Ford contracted with Holt, general contractor, to con-ruct additions to its glass plant at Nashville, Tennessee. Bristol was engaged by contract to install the necessary ructural steel for these additions. Bristol was a subcon-actor to Holt. The Ford-Holt and Holt-Bristol contracts rovided indemnification for ". . . liability for all loss nd/or expense and/or damage and/or claims resulting rom bodily injury . . ." (A. 15)

On April 14, 1967, Elizer, an employee of Bristol, while at work in the existing structure, was injured by an overhead crane owned and operated for production by Ford. Elizer brought suit based on a tort against Ford in the state court in Nashville to recover damages. Holt refused several demands by Ford to furnish a defense and assume responsibility for the case. Ford settled this suit, obtained a signed release from Elizer and brought suit on the indemnity clause in U. S. District Court to recover the amount paid in settlement ($25,000.00) and its expenses ($1,031.90) and interest. Holt, by third party practice, brought Bristol into the litigation and claimed its right of indemnification if found liable to Ford.

The issue of Elizer's contributory negligence was framed by the pleadings and the Pre-trial Order in this suit. (Holt's Answer, App. 7a; Ford's Pre-trial Memorandum, App. 17a; Pre-trial Order, App. 25a)

It is interesting to note that Ford, by its *Statement of Facts on Which Plaintiff Will Rely* (App. 17a, 19a) stated to the district court that "[w]hile working in the vicinity of the crane rail, Mr. Elizer did not keep proper lookout for the movement of the crane . . ." And this fact issue, raised first by Ford, was reflected in the Pre-trial Order (App. 25a, 26a) as being part of the theory of the plaintiff (Ford); therefore, Ford's assertion in its Petition for Writ of Certiorari that this issue was raised first on appeal is in error. (See also A. 13)

After hearing the case, the trial judge was concerned with the question of Elizer's negligence and, upon request, this matter was thoroughly presented to him by memorandum brief. (App. 29a, 30a, 31a)

The district court found as a fact that Elizer was guilty of proximate contributory negligence (A. 11, 13) and that

Ford was guilty of proximate negligence (A. 11, 12), as was Holt and Bristol. (A. 11, 12)

The district court determined, as a conclusion of law, that the indemnity clause provided for indemnification against "claims," and held Holt liable to Ford since it [Holt] had been "vouched in." (A. 14)

On appeal, the Sixth Circuit reversed and held that the trial court's conclusion of law was erroneous, that the clause provided indemnification to Ford for its "liability" for claims. The Sixth Circuit applied Tennessee law. *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938); *Finley* v. *U. S. Casualty Co.*, 113 Tenn. 592, 83 S.W. 2 (1904); and since contributory negligence is a bar in Tennessee, and the district court found as a fact Elizer guilty of proximate contributory negligence, the Sixth Circuit reversed.

On petition to re-hear, the Sixth Circuit concluded that the issue of Elizer's negligence was before the trial court, that the stipulation entered into by the parties stating the settlement with Elizer was reasonable concerned the amount of consideration only, and that Ford had its day in court on the issues involved.

Ford seeks certiorari.

ARGUMENT AGAINST

I. **Where, Pursuant to Erie v. Tompkins, a Court of Appeals Construes and Applies the Law of Tennessee to an Indemnity Clause in a Contract, and After Determining the Legal Effect Thereof, Applies the Facts As Found by the District Court, Has There Been a Departure So Far from Accepted and Usual Course of Judicial Proceedings As to Call for an Exercise of This Court's Power of Supervision? U. S. Supreme Court Rule 19.1 (b), 28 U.S.C.**

First, the question of the effect of the negligence of Elizer, if any, was before the trial court and was a fact issue because Ford made it one and was constantly involved in this litigation. Ford has insisted to the contrary and herein is the cause for this Court to decide this petition. A glance at the pleadings, Holt's Answer, pre-trial memoranda, and pre-trial order, as well as the memorandum submitted at the request of the trial court at the conclusion of the hearing, all pages cited in the statement of the case, clearly indicate this issue was before the trial court and, as a matter of fact, the trial court referred to it. (A. 13)

The pre-trial order framed the issue thusly: "Is the defendant [Holt] liable to the plaintiff [Ford] under the provisions of the contract between the plaintiff and the defendant?" (App. 28a) The Sixth Circuit held that this manifestly brought the issue before the trial court since the indemnity clause provided for indemnification from legal liability. (A. 8)

Respondent says that the Sixth Circuit did not depart from usual and accepted course of judicial proceedings; but, on the contrary, where the district court makes findings of fact supported by the record in the case, but applies a conclusion of law which is erroneous, it is the duty of the

courts of appeals to reverse. And when such occurs, there is no departure at all, let alone one requiring an exercise of this Court's discretionary authority to issue a Writ. U.S. Supreme Court Rule 19:1 (b), 28 U.S.C.

In *Chicago, R. I. & Pacific R. R. Co.* v. *Dobry Flour Mills*, 211 F. 2d 785 (10th Cir. 1954), cited by petitioner, the Tenth Circuit in construing an express indemnity agreement, as the state involved (Oklahoma) would, reversed the district court for an erroneous conclusion of law.

The Sixth Circuit was satisfied that in Tennessee a distinction is made between indemnity for claims and indemnity for liability for claims. Though not precisely on point, the Court relied on *Finley* v. *U. S. Casualty Co.*, 113 Tenn. 592, 83 S.W. 2 (1904), as authority for the conclusion of law applicable to this contract. There is no known authority to the contrary cited by Ford in its petition to this court. Then, surely, there has been no departure from the usual procedure as contemplated by Rule 19:1 (b).

II. In a Diversity Case Decided After Erie v. Tompkins, Should the Court Issue the Writ Where the Petitioner Does Not Cite Cases Demonstrating a Conflict Among the Circuits?

A conflict among the Circuits in diversity cases since *Erie* v. *Tompkins* could possibly occur, but the vast majority of appellate review of cases involving Tennessee law go to the Sixth Circuit. At any rate, the three cases from other Circuits cited by petitioner do not demonstrate any conflict among the Circuits in interpretation of Tennessee law on indemnity agreements. The petitioner's argument that there is a conflict is founded upon a pre-*Erie* v. *Tompkins* belief that a body of "Federal Law" is applicable to diversity cases. And since the petitioner does not cite a

conflict between Tennessee's appellate courts and the Sixth Circuit; denial of the Writ is manifestly in order.

The cases relied upon for demonstration of an alleged conflict are discussed briefly.

Chicago, Rock Island & Pacific Railway Co. v. *United States*, 220 F. 2d 939 (7th Cir. 1955) was a suit for implied indemnification against the government pursuant to the Federal Tort Claims Act, wherein, as required by the common law of Illinois (the place where the tort occurred), the party guilty of the active, direct, proximate and primary cause for the accident must indemnify or contribute, and the Court so held after finding as a fact that the employee of the government was the party guilty of such negligence. This case did not involve an express indemnity agreement.

Missouri Pacific Railroad Co. v. *Arkansas Oak Flooring Co.*, 434 F. 2d 575 (8th Cir. 1970) involved the interpretation of an express indemnity agreement for "claims" as interpreted by the law of Arkansas rather than "liability" for claims.

Chicago, Rock Island & Pacific Railway Co. v. *Dobry Flour Mills*, 211 F. 2d 785 (10th Cir. 1954), cert. den. 348 U.S. 832, also involved an express indemnity for "claims" as interpreted by the law of Oklahoma. It is interesting to note in this case that the district court concluded according to the law applicable that indemnitee must prove "legal liability" in order to make out a case of indemnification. The Tenth Circuit, on appeal, noted that a vast body of authority from other states, both in and out of the Tenth Circuit, had such a rule as relied on by the district court, but that Oklahoma had a different rule. The Tenth Circuit reversed the district court for its erroneous conclusion of the law of Oklahoma applicable to express indemnity agreements for "claims."

In *Tankrederiet Gefion A/S* v. *Hynian Michaels Company*, 406 F. 2d 1039 (6th Cir. 1969), cited by petitioner with the claim that the Sixth Circuit ignored this case, is, as the Sixth Circuit stated in its opinion, clearly distinguishable from cases founded on express indemnity agreements.

The other cases cited by petitioner do not indicate, in respondent's judgment, a conflict or departure from the usual course of procedure or a conflict among the Circuits as relied on by the petitioner.

CONCLUSION

For the reasons stated herein, W. F. Holt & Sons, Inc., respondent, prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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